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In the Supreme Court of the United States

OCTOBER TERM, 1982

MARATHON PIPE LINE COMPANY,
Respondent

versus

ROWAN COMPANIES, INC. and
DRILLING RIG ROWAN/ODESSA,
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF MARATHON PIPE LINE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether the District Court violated Rule 615 of the Federal Rules of Evidence and the "Due Process" clause of the Fifth Amendment to the United States Constitution by temporarily excluding from the trial a fact witness not shown by the record to be an officer or employee of corporate defendant Rowan.

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SUMMARY OF ARGUMENT

The temporary exclusion of the witness Robert McCary from the courtroom was a proper exercise of the trial court's discretion. The record does not show that McCary was an officer or employee of the corporate defendant cast in judgment and hence he does not qualify as a "designated representative" under Rule 615 of the Federal Rules of Evidence. Moreover, petitioner Rowan failed to comply with Rule 46 of the Federal Rules of Civil Procedure. Furthermore, as indicated in the opinion of the Fifth Circuit Court of Appeals, even if the exclusion of the witness had been inappropriate, only harmless error resulted and the petitioner was not prejudiced by the ruling.

ARGUMENT

MAY IT PLEASE THE COURT:

I.

FEDERAL RULE OF EVIDENCE 615(2) IS INAPPLICABLE TO THE FACTS OF THIS CASE

Rowan's argument concerning Rule 615(2) is predicated upon a fact not shown by the record, namely, that McCary was an employee of a party to this litigation. As stated by the Fifth Circuit:

> "[O]n the face of the record McCary was not an employee of the Rowan Companies, Inc., the party to the proceedings. McCary testified on the stand that he was an employee, apparently, of a separate corporation, Rowan International. Rule 615, Fed.R.Evid., requires that to be excepted from sequestration the representative must be "an officer or employee of a party which is not a natural person...." Nothing in the record shows what the relationship was between the Rowan Companies and Rowan International nor does it show that McCary actually was an employee of the Rowan Companies, Inc. The record does not establish that the Rowan Companies were entitled to claim McCary as their representative under Rule 615."

Since the petitioner failed to prove that McCary was an employee of Rowan Companies, Inc., there is no basis for Rowan's argument. The exclusion of McCary was a proper exercise of the trial court's discretion.

II.

ROWAN FAILED TO COMPLY WITH FRCP 46 AND THUS FAILED TO PRESERVE THIS ISSUE FOR APPELLATE REVIEW

As was stated in this case by the Fifth Circuit:

> "While it is true that Rule 46 of the Fed.R.Civ.P. does not require formal exceptions to rulings or orders of the court, that rule requires that the party must make known "to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." After the objection to McCary's presence was made by another party, Rowan did not make known to the court any action which it desired the court to take. Nor did it object to the action of the court. Reading the record, there is no way the court could have concluded that Rowan wished to make an issue of its action or disagreed with it in the slightest degree."

> "[N]o objection nor claim of violation of the Constitution or laws or of Rule 615, Fed.R.Evid., was lodged by the Rowan Companies. There was not the slightest indication given that Rowan in any way disapproved of the ruling of the trial judge at that time or at any other time while this case was pending in the district court. This, undoubtedly, is why the district court did not refer to this matter in its opinion."

Rowan is not entitled to raise this argument as an afterthought and seek relief at the appellate level.

III.

PETITIONER WAS NOT PREJUDICED BY THE LOWER COURT RULING

Even if the record supported Rowan's argument regarding Rule 615, the result would be harmless error absent a demonstrated prejudice to Rowan resulting from McCary's temporary absence from the courtroom until after he testified. There is no authority cited by Rowan which mandates a reversal. As was stated by the Fifth Circuit:

> "The Rowan Companies make no showing that the ruling was prejudicial, and prejudice must be shown to justify reversal. As this Court held in *United States v. Warren*, 578 F.2d 1058, 1076 (5th Cir. 1978) (en banc), the failure to sequester government witnesses, while clearly error, does not require reversal even in a criminal case without proof of prejudice."

Rowan failed to meet the burden of proving prejudice. This is especially true in light of the fact that this is a civil case. There is no criminal confrontation issue here. Rowan raises no question relating to a constitutional right. McCary's exclusion was temporary and minimal and Rowan has not shown any prejudice resulting therefrom.

CONCLUSION

There is not the slightest suggestion in the issue raised by Rowan that Marathon is not entitled to be reimbursed for the amount of its damages. Nor is there the slightest question raised concerning the *in rem* responsibility of the Rowan drilling rig against which judgment entered in the

trial court. Granting of the writ would do no more than require a retrial of the same issues with the same inevitable result. For the foregoing reasons, Rowan's petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing have been served on the parties required to be served under Rule 28 of the Rules of the United States Supreme Court, as follows:

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